No. 89-1380

In the Supreme Court of the United States

OCTOBER TERM, 1989

RANDY WILLIAM CRIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
DEBORAH RUTH KANT
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the United States is not liable under the Federal Tort Claims Act for injuries caused by an intoxicated driver after federal law enforcement officers declined to arrest him, where state law imposes no corresponding duty on private persons or law enforcement officers to restrain an intoxicated driver in order to prevent possible injury to third parties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 885 F.2d 294. The opinion of the district court (Pet. App. A15-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1989, and a petition for rehearing was denied on December 6, 1989. Pet. App. A33. The petition for a writ of certiorari was filed on March 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680, petitioner seeks to recover damages from the United States for injuries he sustained in a collision between the motorcycle he was riding and an automobile driven by a private citizen, John Landry.

1. On July 23, 1983, at approximately 3:40 in the afternoon, two Park Rangers of the United States Park Service stopped Landry, who was speeding along the beach of the Padre Island National Seashore with two fifteen-year-old girls riding on the hood of his car. The Rangers detected the aroma of alcohol on Landry's breath, and a subsequent search of his car revealed four ounces of marijuana butts and leaves, a homemade pipe for smoking marijuana, a partially empty bottle of whiskey, and eight bottles of beer. The Rangers issued citations to Landry for possesion of a controlled substance, possession of alcohol by a minor, speeding, and failure to have mandatory liability insurance. These citations required Landry to appear before a United States Magistrate the following Monday. Landry was not charged with driving under the influence of alcohol or drugs. Pet. App. A2, A17-A20.

After issuing the citations, one of the Rangers told Landry not to drive for an hour and a half so that he could sober up. The two Rangers then left to take the teenage girls to their station and arrange other transportation home for them. Landry did not heed the Ranger's instructions and departed immediately. Later in the day, he picked up a friend, James Wallace, and made an illegal purchase of whiskey. Throughout the evening and into the early morning, he drank alcohol and smoked marijuana. At 1:40 in the morning of July 24, while speeding and attempting to pass three cars, Landry collided with petitioner, who sustained serious injuries. Pet. App. A2-A3, A20-A21.

2. Petitioner thereafter brought the instant FTCA suit in the United States District Court for the Southern District of Texas. He alleged that the Park Rangers were negligent in failing to charge Landry with driving under the influence of alcohol or drugs and to arrest him when they stopped him on the afternoon of July 23, 1983. Petitioner further alleged that the Rangers' conduct contributed to his injuries, because Landry would have been incarcerated, rather than driving on the highway, if they had taken him into custody and impounded his vehicle.

The district court entered judgment in favor of petitioner and awarded him $7.5 million in damages. Pet. App. A1, A15-A26; Dist. Ct. Judgment (entered June 29, 1988). The district court held that the decision to institute criminal proceedings through citations that required Landry's appearance in federal court, rather than through a custodial arrest, did not fall within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), because such day-to-day law enforcement decisions are not, in the court's view, discretionary. Pet. App. A23. The court also believed that Texas tort law imposed a duty on policemen to exercise due care in carrying out law enforcement responsibilities that might have an effect on third parties. In finding such a duty under state law, the court relied, *inter alia*, on Texas precedents holding the State and its police officers liable for the officers' traffic accidents, Pet. App. A24 (citing *State* v. *Terrell*, 588 S.W.2d 784 (Tex. 1979); *Eubanks* v. *Wood*, 304 S.W.2d 567 (Tex. Civ. App. 1957), writ ref. n.r.e.), and holding an employer liable for the torts of an intoxicated employee. Pet. App. A25 (citing *Otis Engineering Corp.* v. *Clark*, 668 S.W.2d 307 (Tex. Civ. App. 1984)).[1]

[1] The district court also relied on a Fifth Circuit decision rendered in 1892, more than 50 years prior to enactment of the FTCA. Pet. App. A24 (citing *Asher* v. *Cabell*, 50 F. 818 (1892)). There, a United States

The district court further held that the Rangers' failure to arrest Landry and take him into custody proximately caused petitioner's injuries. Pet. App. A24-A26. The court relied in part upon testimony that the residue of the alcohol and marijuana consumed by Landry before the Rangers stopped him during the afternoon of July 23 contributed to the accident ten hours later. *Id.* at A21-A22, A26. The court also found it foreseeable that Landry would remain intoxicated, presumably by consuming more alcohol later in the evening, and that his resulting impaired state could cause harm to others. *Id.* at A26.

3. A unanimous panel of the court of appeals reversed the judgment in favor of petitioner (Pet. App. A1-A14), finding that Texas tort law does not impose an analogous duty on private persons to restrain drunk drivers or on state law enforcement officers to arrest or restrain a suspect in order to prevent injuries to third parties. *Id.* at A4-A14.

With respect to private persons, the court of appeals concluded that the Texas courts have imposed a duty to restrain intoxicated persons only in limited circumstances involving a special relationship between the two parties – for example, where there was an employer-employee relationship between the parties and the employer affirmatively exercised control over the employee. Pet. App. A9-A13, discussing *Otis Engineering Corp.*, *supra*. Beyond this "unique species of liability premised on the employer-employee relation," the court of appeals found that Texas law imposes no other duty on private persons to restrain or control intoxicated persons. *Id.* at A13. The court also observed that Section 319 of the Restatement (Second) of Torts (1965), does not supply a basis for liability, because (i) Texas law has not fully adopted the duty of reasonable care Section 319 im-

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Marshal was held personally liable under the Texas wrongful death statute for his negligent failure to protect a prisoner in his custody.

poses on one "who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others," and (ii) the duty imposed by Section 319 is inapplicable here in any event because petitioner's suit rests on the different theory that the Park Rangers did *not* take charge of Landry and were negligent in failing to do so. Pet. App. A14.

The court of appeals likewise held that Texas tort law does not impose any duty on state police officers "to protect the public from acts of a criminal suspect." Pet. App. A7. Although it noted that police officers may owe a duty to the public in general, the court found no Texas precedent for the proposition that a police officer owes an actionable duty to any particular member of the public, such as petitioner. *Id.* at A7-A8. Quoting one Texas appellate decision that rejected such a theory of liability, the court of appeals explained that if law enforcement officers were liable for their decisions regarding "if, how, and when to arrest a person, * * * then, to avoid liability, police officers would have to *arrest all persons* stopped by them * * * . Sound jurisprudence as well as the public interest could not tolerate such a holding." *Id.* at A8 (quoting *Dent* v. *City of Dallas*, 729 S.W.2d 114, 116 (Tex. Ct. App. 1986), writ ref. n.r.e., cert. denied, 485 U.S. 977 (1988)).

ARGUMENT

Since Texas law does not impose an actionable duty on either private persons or law enforcement officials to take an individual into custody to prevent injury to a third party, the court of appeals correctly held that the United States is not liable for the injuries sustained by petitioner as a result of the conduct of a private party (John Landry). The court of appeals' resolution of that question of state law does not conflict with any decision of this Court or of another court

of appeals and presents no question of general importance warranting review. In fact, petitioner does not present that question for review (see Pet. i), and he makes virtually no effort to challenge the court of appeals' disposition of it. Instead, petitioner seeks to raise for the first time in this litigation the distinct contention that the United States should be held liable under the doctrine of negligence per se, based on what he claims are mandatory federal regulations that required the Rangers to take Landry into custody. It is too late for petitioner to inject that new theory of liability into this case, and his negligence per se argument is without merit in any event because no federal regulations imposed such a duty on the Rangers. The petition for a writ of certiorari therefore should be denied.

1. Petitioner does not seriously challenge the court of appeals' holding that Texas law did not impose an actionable duty on the Park Rangers to arrest Landry in order to prevent injuries he might cause to petitioner.[2] Petitioner only goes so far as to characterize that holding as "questionable" and to assert in a footnote that the court of appeals erred in declaring that Section 319 of the Restatement (Second) of Torts (1965) does not reflect Texas law. See Pet. 16 & n.8. Contrary to petitioner's assertion, however, the Texas

[2] As the court of appeals pointed out (Pet. App. A9 n.3), a clear majority of other States likewise have declined to impose liability in circumstances such as these.

The government argued in the court of appeals that any duty of law enforcement officers under state law was not relevant under the FTCA, since the Act abrogates the sovereign immunity of the United States only where a "private individual" would be liable "under like circumstances." 28 U.S.C. 2674; see Pet. App. A5. In view of the holding of the court of appeals – that no such duty exists under state law – that issue is not presented by the petition. We believe, however, that this argument furnishes an alternative ground to support the judgment below.

Supreme Court did not adopt Section 319 in its entirety in *Otis Engineering Corp.*, *supra*; it relied on Section 319 in imposing a duty only in limited circumstances arising out of an employer-employee relationship. More importantly, as the court of appeals explained, Section 319 by its terms applies only *after* a person has taken charge of a dangerous person. Pet. App. A14.[3] Here, however, it is undisputed that the Park Rangers did not take Landry into custody or otherwise take charge of him. As a result, even if we assume arguendo that the Texas courts would adopt Section 319 of the Restatement in its entirety, the duty described in Section 319 was never triggered in this case. Accordingly, the court of appeals' application of Texas law was not "questionable"; it was correct.

Texas law is by no means unique in declining to impose an actionable duty on law enforcement officers in these circumstances. It is a firmly rooted principle of the common law that neither the government nor a law enforcement officer it employs owes a duty to a particular member of the public to prevent injuries that might be sustained by a breach of the peace or other violation of the law. As this Court has observed, "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Turner* v. *United States*, 248 U.S. 354, 358 (1919); see also *South* v. *Maryland*, 59 U.S. (18 How.) 396 (1856).[4] This

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[3] Section 319 states:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

[4] This substantive rule of tort law is closely related to the principle that a private person ordinarily does not have standing to procure

principle has been recognized in numerous cases arising under the FTCA as well. See, *e.g.*, *Frigard* v. *United States*, 862 F.2d 201, 203 (9th Cir. 1988), cert. denied, 109 S. Ct. 2448 (1989); *Prelvitz* v. *Milsop*, 831 F.2d 806, 810 (8th Cir. 1987); *Georgia Casualty & Surety Co.* v. *United States*, 823 F.2d 260, 263 (8th Cir. 1987); *Abernathy* v. *United States*, 773 F.2d 184, 188-190 (8th Cir. 1985); *Bergmann* v. *United States*, 689 F.2d 789, 796 (8th Cir. 1982); *Redmond* v. *United States*, 518 F.2d 811, 816 (7th Cir. 1975). The court of appeals' adherence to these settled principles in its application of Texas law does not warrant further review. Indeed, as the court of appeals explained, relying on a Texas decision declining to impose liability in similar circumstances, a contrary rule would require police officers to arrest all persons whenever probable cause exists, because of the possibility that suspects might cause harm to third parties. Pet. App. A8.

2. Instead of challenging the court of appeals' holding that Texas law does not impose an actionable duty on law enforcement officers to arrest a suspect in circumstances such as those presented here, petitioner argues (Pet. 13-19) that the United States should be held liable under the doctrine of negligence per se for the Park Rangers' alleged violation of *federal* regulations that, in petitioner's view, required them to arrest Landry. Petitioner did not advance this distinct theory of liability in either court below, and there accordingly is no reason for this Court to consider it. *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 604 (1990); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).[5] That is

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enforcement of the laws. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

[5] Although the Park Service's internal manual, discussed below, was in the record before the district court, petitioner relied on the manual not to establish that the Rangers owed him a duty but only to show

especially so since petitioner's theory would require the Court to consider questions of Texas tort law (concerning the doctrine of negligence per se) that are better resolved by the lower federal courts in the first instance. In fact, petitioner concedes (Pet. 18) that this Court does not ordinarily pass on questions of state law in the first instance, particularly where those questions have not been raised below. See *Sheridan* v. *United States*, 487 U.S. 392, 401-402 (1988). There is no reason for the Court to depart from that settled rule here.

In any event, this case would not present the Court with an appropriate occasion for exploring the potentially complex interaction between mandatory federal regulations and a duty imposed by state tort law under the doctrine of negligence per se, because there was no mandatory federal regulation applicable here that could furnish the necessary predicate for invocation of that doctrine. No Park Service regulation prescribes when, and under what circumstances, a Park Ranger must charge a suspect with driving under the influence of alcohol or drugs and must arrest the suspect on that charge. Petitioner cites (Pet. 4) 36 C.F.R. 4.6 (1986), but that regulation merely prohibits driving under the influence of intoxicating liquor or drugs; it does not dictate what action a Park Ranger must take if he stops a suspect.

Petitioner also relies (Pet. 4-5, 9-10) on the Law Enforcement Procedures of the Padre Island National Seashore. However, those Procedures are internal guidelines for the benefit of law enforcement personnel. They do not have the force of formal regulations that prescribe actionable duties owed to an individual member of the public, such as petitioner.[6] Moreover, the portion of the Procedures

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that the Rangers' actions did not fall within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).

[6] As the Texas Supreme Court has explained, the doctrine of negligence per se comes into play only if there is an "unexcused viola-

upon which petitioner relies contains a checklist of factors to guide a Park Ranger once the Ranger has decided to charge a suspect with driving under the influence of alcohol or drugs: if a suspect is charged with that offense, the Ranger is instructed to arrest him and impound the vehicle. Here, however, as found by the district court and affirmed by the court of appeals (Pet. App. A2, A19), the Park Rangers decided not to charge Landry with driving under the influence of alcohol or drugs, but instead to charge him with the lesser offense of possession of alcohol and drugs. The Law Enforcement Procedures of Padre Island National Seashore do not speak to this antecedent question of what charges a Park Rangers should prefer in the first place. Because petitioner has not identified any federal regulation that mandated a particular course of action by the Park Rangers, the doctrine of negligence per se cannot give rise to liability in this case—even if we assume, arguendo, that the other prerequisites (see Pet. 13-16, 18) necessary for application of that doctrine under Texas law were satisfied. See note 6, *supra*.[7]

Petitioner's reliance (Pet. 17-18) on *Doggett* v. *United States*, 875 F.2d 684 (9th Cir. 1989), in support of his new negligence per se theory is misplaced. In *Doggett*, there

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tion of a statute or ordinance" and "such statute or ordinance was designed to prevent injury to the class of persons to which the injured person belongs." *Nixon* v. *Mr. Property Management Co.*, 690 S.W.2d 546, 549 (1985). Even if the internal checklist of procedures for the various criminal charges constitutes a mandatory regulation, nothing in this checklist suggests that it was intended to establish an actionable duty to any individual member of the public.

[7] For similar reasons, petitioner errs in relying (Pet. 12) on the Good Samaritan doctrine. In the absence of a binding federal regulation, there is simply no undertaking the government can be said to have assumed. See *Sheridan* v. *United States*, 487 U.S. at 401; *Moody* v. *United States*, 774 F.2d 150, 156-157 (6th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

was a specific California statute rendering public entities liable for violations of mandatory enactments, and the Ninth Circuit concluded that a federal regulation imposed duties on federal officers comparable to those imposed by a mandatory enactment under California law. *Id.* at 690-693. In this case, by contrast, petitioner concedes (Pet. 18) that Texas has no comparable statute imposing liability for violations of mandatory enactments, and, as we have shown (see pages 9-10, *supra*), there is in any event no federal enactment (or analogous regulation) requiring Park Rangers to charge an individual with driving under the influence of alcohol or drugs and to arrest the suspect.[8]

In the absence of any regulation that could be construed to trigger the doctrine of negligence per se, it is well settled that the existence of a federal statute or regulation does not itself create a duty for purposes of state tort law or give rise to a cause of action against the United States under the FTCA for injuries sustained as a result of a violation of the statute or regulation. *Art Metal-U.S.A., Inc.* v. *United*

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[8] There would be further difficulties in imposing liability on the United States under the FTCA on a negligence per se theory in the circumstances of this case, in light of the firmly established principle, discussed above (see pages 7-8, *supra*), that the government does not have an actionable duty to enforce the law in order to prevent injuries to third parties. If that settled principle is to be changed with respect to the actions of *federal* law enforcement officers, it is the responsibility of Congress to enact the necessary statute. Only Congress is in a position fully to weigh the competing considerations, including the potential adverse effects on the liberties of private individuals and the performance of traditionally discretionary federal law enforcement activities. At the very least, a federal regulation should not be read to impose an actionable duty on federal law enforcement officers in circumstances such as these in the absence of the clearest expression of an intent to that effect by the federal officials responsible for promulgating that regulation. Petitioner has pointed to no such expression here.

States, 753 F.2d 1151, 1157 (D.C. Cir. 1985); *Sellfors* v. *United States*, 697 F.2d 1362, 1365-1367 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984); *United Scottish Ins. Co.* v. *United States*, 614 F.2d 188, 194 n.4 (1979), aff'd after remand, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds *sub nom. United States* v. *Varig Airlines*, 467 U.S. 797 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
DEBORAH RUTH KANT
Attorneys

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